No. 82-1146

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*
Respondents.

Reply To Respondents' Brief In Opposition To The Petition Of The National Electrical Contractors Association, Inc.

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6044

MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD, BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910

SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY & GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

Attorneys for Petitioners National Electrical Contractors Association, Robert L. Higgins and H.E. Autrey and Other Individuals Sued In Their Individual Capacities and as Trustees of The National Electrical Industry Fund; Colgan Electric Company, Inc. and Miller Electric Company

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I

INTRODUCTION

Petitioner National Electrical Contractors Association, Inc. (NECA)[1] and the International Brotherhood of Electrical Workers (IBEW), in separate petitions, requested the Court to review a judgment by the United States Court of Appeals for the Fourth Circuit affirming a summary judgment by the District Court against the employer association and the International Union, IBEW. Miller and Colgan, two individual defendants, also filed a petition on the issue of venue. The Respondents filed Briefs in Opposition to the three petitions.

[1] The corporate listing statement for NECA appearing in its Petition for a Writ of Certiorari (at pages ii-iii) is still current and correct.

II

THE QUESTION RAISED BY NECA'S PETITION FOR CERTIORARI HAS NOT BEEN ADDRESSED BY RESPONDENTS

NECA's Petition seeks the Court's review of an important issue of federal law *never before considered by this Court*. That issue is whether it is price fixing *per se* for an employer association and an international union to establish by collective bargaining an industry fund which is binding on NECA members, but is binding on non-NECA electrical contractors only if they voluntarily authorized or adopted the local NECA-IBEW agreements containing the industry fund.

As the District Court for the Eastern District of Virginia specifically found,[2] and as pointed out by dissenting Judge Hall of the Fourth Circuit in his opinion in this case, *all* electrical contractors derived valuable benefits from the activities sponsored by and paid for out of the industry fund.

In our view, it is crucial in this case that the courts below ruled out any *coercion* and failed to find that any non-NECA member was *forced* or *required* to pay into the fund. Thus, the entire arrangement was voluntary. However, the court below regarded the fact of voluntariness as irrelevant, based upon its astounding reading of the *in pari delicto* holding in *Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134 (1968).

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[2] Unpublished memorandum opinion, *C.L. Williams* v. *ITT Grinnell Industrial Piping, Inc.* (E.D. Va. 1980); see Appendix to our Petition, p. 121a.

III

THE RESPONDENTS' OPPOSITION FAILS TO COME TO GRIPS WITH THE CRUCIAL ISSUES RAISED BY THE PETITIONERS

The Respondents' Brief does not directly address any of the crucial issues raised by our Petition for Certiorari. Rather, the opposition takes random shots at the industry fund without presenting a cohesive analysis of the basic issues or attempting to present legal and factual support for the decision of the court below. Thus, Respondents' Opposition attempts to refute arguments not even made in our Petition and erroneously reframes others to set them up as "straw men" in order to knock them down.

Respondents would have the Court believe that this is an ordinary "garden-variety price fixing" case. But, even both courts below recognized that this is a case of "first impression"—a situation typically unsuited for *per se* treatment. The fallacy of Respondents' characterization of this case as simple garden-variety price fixing with which the courts deal all the time is that nowhere in their brief can Respondents themselves define the "commodity" or "article of commerce," the price of which has been fixed.

It would be a waste of time to attempt to answer all the irrelevancies and distortions in Respondents' Opposition Brief. However, several arguments are so ill-founded that it is necessary to get the record straight on certain salient points.

1. The Opposition Brief does not actually dispute one of the pivotal facts in this case. That fact, admitted by the court below, is that no non-NECA member was *coerced* or *forced* to adopt the local NECA-IBEW agreements containing the industry fund. We believe that this admission by the lower court is fatal to the majority decision

below. Industry funds are lawful permissive subjects of bargaining, and if no one was coerced into adopting the industry fund, the agreement establishing the fund could not possibly violate antitrust law.

Respondents make several statements obliquely touching on this point, but they do not contradict the *basic voluntariness* of the industry fund as applied to non-NECA members. Respondents assert that non-NECA members "have no right to vote" on the collective bargaining agreements of NECA. It is true that only NECA members vote on NECA agreements, but that is totally irrelevant. Non-NECA members, by "letters of assent" voluntarily given, authorized or adopted the agreements for their own benefit and voluntarily made themselves parties to them. Respondents go further and suggest that with two exceptions they are "barred" from NECA membership. The statement is disingenuously misleading because this is a class whose members are restricted to electrical contractors. NECA excludes no electrical contractors and, in fact, Foley and Commonwealth, the class representatives, were former NECA members. The other named plaintiffs are not electrical contractors.

If non-NECA contractors did not wish to adopt the NECA agreements, they were totally free to negotiate their own separate agreements, and some did. Respondents assert that it is "not normal" for non-NECA contractors to negotiate their own agreements, but do not dispute that it was their own free choice to do so. The record is clear on that.

2. Respondents imply that non-NECA members were "obligated" or "required" to pay into the fund. This statement is not true if it is intended to convey the thought that they were obligated or required to pay *ab-*

sent their own consent. Of course, those who gave plenary authority to NECA chapters to negotiate for them became a part of the NECA bargaining units and became obligated to *all* lawful terms of the contracts negotiated by NECA chapters with IBEW locals. Those who signed "assents" to the agreements containing the industry fund after they were negotiated cannot complain that they were coerced. The crucial admitted fact is that no non-NECA contractor was "required" or "obligated" to give its initial plenary bargaining authority to NECA chapters or to sign a letter of assent to the agreement after it was negotiated. The non-NECA contractor who did not wish to adhere to either of these two options had the right to negotiate his own agreement and to reject the industry fund. As a permissive subject of bargaining, the industry fund could not be insisted upon. In fact, Respondents concede that President Pillard of the IBEW instructed all IBEW local construction unions to take the industry fund off the bargaining table if the contractor in negotiations objected to it.

3. Respondents complain that they were not allowed to assent only to *some* parts of a NECA-IBEW agreement, while receiving *all* its benefits. This position would have validity only if the industry fund were an illegal subject of bargaining, which is not the case. Not surprisingly, it was the long-standing policy of the IBEW not to accept a modified assent which would have allowed a contractor to "pick and choose" which provisions to accept. The NLRB reviewed this IBEW conduct and policy and found nothing that violated the National Labor Relations Act or labor policy. If the non-NECA contractor did not like the Agreement, his recourse was to negotiate his *own* separate agreement.

4. Respondents imply that non-NECA members received no benefits from the industry fund. This is contra-

ry to the record evidence, contrary to the holding of the district court in the *Grinnell* case, *supra*, contrary to the finding of dissenting Judge Hall in the lower court, and contrary to the prescribed purposes of the Trust. Moreover, this is a feeble and far-fetched attempt to discredit the *administration* of the fund. However, the finding which we seek to have reviewed has nothing to do with maladministration of the fund. The court below made no such finding. The finding on which we seek review is that *mere establishment* of the fund was price fixing, illegal *per se*.

5. Respondents claim that the decision below does not jeopardize industry funds generally, or interfere with the collective bargaining process. Respondents are clearly trying to play down the far-reaching impact of the decision below to persuade the Court that this case has no national import. The *amici curiae* briefs filed with the Court show the deep concern of other sectors of the construction industry with the destructive impact of the decision below on all industry funds. The construction industry generally views the lower court's decision as a serious threat to the continued existence of industry funds, however it is construed.

Similarly, Respondents assert that the decision of the lower court has no impact on collective bargaining. This is obviously false. The court below condemned as price fixing, illegal *per se*, an unexceptional labor agreement containing a perfectly permissible subject of bargaining, binding only on those who authorized its negotiation or accepted the results of the bargaining, with full knowledge of the inclusion of the industry fund. The effect on collective bargaining is obvious and profound. The impact is sharpened by the direct conflict between the antitrust decision of the court below and the labor policy of the NLRB, which has upheld the validity of the agreement in

question, and specifically the negotiation and implementation of the industry fund.

6. Respondents assert that the amount of industry fund monies spent on labor relations is "extremely small" in relation to total expenditures. This statement reflects a deliberate distortion of the facts. Respondents refer to page 5 of NECA's Petition for Certiorari as support for this statement. First of all, NECA's petition at pages 5 and 6 simply enumerates the industrywide services to be financed from the fund. Six services are listed, four of which deal directly with financing the industry's participation in labor relations. These include negotiating and implementing local and national collective bargaining agreements, maintaining a national arbitration system, implementing employee training programs, and financing NECA's nationwide labor relations services. The bulk of the monies are spent on those endeavors. Moreover, the remaining two trust purposes are also designed to help the *entire* industry. These consist of increasing industry advertising and of improving industry and governmental codes and specifications.[3]

7. Respondents, without any record support, characterize the industry fund as a "total elimination" of price competition between NECA and non-NECA contractors. The statement could be true only if payment of between .2 to 1% of payroll by non-NECA contractors into an industry fund on the same basis as NECA contractors would eliminate or seriously impact upon price competition. To assert that it does is a long leap from fact to fantasy. The court below made no such finding. Indeed, there is considerable testimony by non-NECA contractors to refute

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[3] Respondents' uninformed analysis of NECA's budget is wholly inaccurate and has no validity whatsoever.

it. Furthermore, if the case is to turn on the *effect* of the industry fund on price, Petitioners are at least entitled to a trial on the merits under the rule of reason.

8. Respondents assert that "an agreement to equalize the cost of belonging to a trade association is *per se* price fixing in a commercial market" (Brief in Opposition, p. 18). The cost of being a NECA member was never at issue, but the legal proposition asserted is obviously wrong.

9. Obviously, Respondents' assertions that this case has "no relationship to the elimination of free riders" cannot be true. As dissenting Judge Hall pointed out, non-NECA members were receiving a "free ride" on substantial benefits derived from NECA agreements and NECA services. The Respondents cannot be heard to dispute this point. In their Opposition to the Petition for Certiorari filed by Miller Electric and Colgan Electric (No. 82-1143), two of the Defendants in this case, Respondents vigorously argue that the NECA services are numerous, "valuable," and "vital" to the contractors' ability to conduct business (Respondents' Opposition Brief, p. 5, in No. 82-1143).

CONCLUSION

Petitioners' legal arguments and analysis of the facts under prevailing labor and antitrust law and policy are fully discussed in the Petition.

Respectfully submitted,

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6044

MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD, BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910

SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY & GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

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